fact that that provision, being directly effective, may be relied on before national courts, since that is no more than a minimum guarantee and cannot resolve the difficulties, regarding the requirements of legal certainty, created by the retention in domestic legislation of provisions which do not provide for account to be taken of the residual amount of tax.

Defence submissions based on the absence at present of a common system applicable to the imports in question and on arguments relating to the nature of VAT and the apportionment of tax revenue between Member States can be of no avail in denying the failure to fulfil obligations. In the first place, the deduction in the Member State of importation of the amount of VAT the Member State of exportation and still contained in the value of the goods at the time of their importation does not call in question the inherent nature of VAT as a tax on consumption, in so far as such a description is independent of the apportionment of the tax charge between the Member State of exportation and that of importation. Secondly, whilst the establishment of a common system of VAT entailing complete neutrality in the field of competition, the full remission in the State of exportation of VAT in respect of the goods in question, as well as the fair and equitable apportionment of tax revenue between Member States are all matters for the Community legislature, so long as such a system is not established, Article 95 precludes a Member State from applying its system of VAT to imported products in a manner contrary to the principle of non-discrimination in matters of taxation.

REPORT FOR THE HEARING
in Case C-159/89 *

I — Facts and procedure

1. *Legal framework*

(a) Relevant Community law

The first paragraph of Article 95 of the EEC Treaty provides that:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.'

That provision imposes an absolute prohibition which is of direct effect and is designed to ensure the complete neutrality

* Language of the case: Greek.

of internal taxation as regards competition between domestic products and imported products. [1]

In addition, Article 2 of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (Official Journal 1977 L 145, p. 1) provides that the importation of goods shall be subject to VAT, whether carried out by a taxable or a non-taxable person.

Asked whether the levying of VAT upon the importation of goods from another Member State which were supplied by a private individual was compatible with Article 95 of the EEC Treaty in cases where no VAT was levied on the supply of goods between private individuals within the Member State of importation, the Court stated, in its judgment in the *Gaston Schul I* case (Case 15/81 [1982] ECR 1409), that

'. . . it is necessary also to take into account the value added tax levied in the Member State of exportation for the purpose of determining the compatibility with the requirements of Article 95 of a charge to value added tax on products from another Member State supplied by private persons where the supply of similar products within the territory of the Member State of importation is not so liable. Accordingly, in so far as such an imported product supplied by a private person may not lawfully benefit from a remission of tax on exportation and so remains burdened upon importation with part of the value added tax paid in the Member State of exportation, the amount of value added tax payable on importation must be reduced by the residual part of the value added tax of the Member State of exportation which is still contained in the value of the product when it is imported. The amount of this reduction may not, however, be greater than the amount of value added tax actually paid in the Member State of exportation.'

In its judgment in the *Gaston Schul II* case (Case 47/84 [1985] ECR 1491), a case concerning the method by which the amount of VAT due at the time of importation was to be determined, the Court ruled that:

'Where a Member State charges VAT on the importation, from another Member State, of goods supplied by a non-taxable person, but does not charge VAT on the supply by a private person of similar goods within its own territory, the VAT payable on importation must be calculated by taking into account the amount of VAT paid in the Member State of exportation that is still contained in the value of the goods at the time of importation, in such a way that that amount is not included in the taxable amount and is in addition deducted from the VAT payable on importation.'

The Court subsequently pointed out, in its judgment in Case 39/85 (*Bergeres-Becque* [1986] ECR 259), that the principles formulated in the *first* and *second Gaston Schul* cases were equally applicable where the transaction giving rise to the importation was not effected for valuable consideration.

1 — See the judgments of the Court of 27 February 1980 in *Commission* v *France* (Case 168/78 [1980] ECR 347), *Commission* v *Italy* (Case 169/78 [1980] ECR 385) and *Commission* v *Denmark* (Case 171/78 [1980] ECR 447)

Furthermore, the Court stated in its judgment in Case 299/86 (*Drexl* [1988] ECR 1213) that those principles also applied in the case of the importation by a private individual of goods from another Member State where the conditions for entitlement to a tax exemption in the Member State of importation were not satisfied.

(b) Proposals for a directive

On 23 July 1984, the Commission submitted to the Council a proposal for a Sixteenth Directive on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: common scheme for certain goods on which value added tax has been finally paid and which are imported by a final consumer in one Member State from another Member State (Official Journal 1984 C 226, p. 2; hereinafter referred to as 'the original proposal for a Sixteenth VAT Directive'). The system which that proposal sought to introduce in order to avoid double taxation involved in principle a refund of tax on exportation and the charging of tax on importation, provided that a number of conditions concerning the value of the goods and the period between exportation and final supply were satisfied.

The original proposal for a Sixteenth VAT Directive was subsequently amended to take account of the opinion of the European Parliament. On 25 March 1986 the Commission submitted to the Council the amended proposal for a Sixteenth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: common scheme for certain goods on which value added tax has been finally paid and which are imported by a final consumer in one Member State from another Member State (Official Journal 1986 C 96, p. 5; hereinafter referred to as 'the amended proposal for a Sixteenth VAT Directive'). The amended proposal seeks to establish a system based on exemption from VAT in the Member State of importation, subject to a number of conditions concerning the value or nature of the goods or the period between exportation and final supply, or both. A method for refunding tax on exportation and charging tax on importation would be applied to goods not exempted at the time of importation. This proposal for a directive has not yet been adopted.

2. *The pre-litigation stage*

The Commission served notice on the Hellenic Republic by a letter dated 13 July 1987. In that letter, the Commission referred to the principles established, in particular, in the judgments in the *Gaston Schul I* case and the *Gaston Schul II* case and in the *Bergeres-Becque* case, cited above, and claimed that the omission on the part of the Hellenic Republic to adopt measures designed to ensure that VAT paid in a Member State and still contained in the value of goods at the time of their importation by a private individual into Greece would be taken into account when calculating the VAT due on the importation of the goods in question, amounted to a failure to fulfil its obligations under Article 95 of the EEC Treaty. The Commission requested the Hellenic Republic to submit its observations within a period of two months.

The Hellenic Republic replied by letter of 27 October 1987, in which it claimed that it was under no obligation to inform the Commission of national measures giving

effect to Article 95 of the EEC Treaty or to the relevant principles laid down by the Court on the grounds that Article 95 of the EEC Treaty is directly applicable and that judgments of the Court cannot be treated in the same way as directives, for example, in respect of the obligation to notify measures adopted to comply with them. In addition, it took the view that the procedure instituted by the Commission was unjustified because it was not based on any conclusive proof that the Hellenic Republic, in cases identical to those which had been the subject of the aforementioned judgments of the Court, had failed to apply the principles deriving from those judgments. It also regarded the opening of the procedure as inappropriate in view of the fact that the procedure for the adoption of the amended proposal for a Sixteenth VAT Directive was still in progress. In addition, it submitted to the Commission a number of considerations on the question of avoiding double imposition of VAT, which, in its view, could result in amendments to the principles laid down by the Court. Finally, the Hellenic Republic submitted that the only solution to the question which would be both legally sound and generally applicable lay in the adoption of a Community directive.

On 8 July 1988, the Commission delivered to the Hellenic Republic the reasoned opinion provided for by Article 169 of the EEC Treaty. In that reasoned opinion, the Commission maintained the position which it had taken in the letter of notice. It claimed that the Greek authorities were under an obligation to clarify their legislation and, if necessary, to notify the public and the Commission of the measures adopted to comply with obligations arising under the Treaty. The Commission also pointed out that it had received complaints relating to double imposition of VAT at the time of importation into Greece by private individuals of goods on which VAT had definitively been paid in another Member State, and it gave the Hellenic Republic a two-month period within which to comply with the reasoned opinion.

In the absence of a reply from the Hellenic Republic to the reasoned opinion, the Commission brought the present action under Article 169 of the EEC Treaty.

3. *Procedure*

The Commission's application was lodged at the Court Registry on 3 May 1989.

The Kingdom of Spain, by a application lodged at the Court Registry on 24 July 1989, sought to intervene in support of the submissions made by the defendant. The Court allowed that intervention by an order of 4 October 1989.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. The parties were requested to reply in writing to a number of questions.

II — Forms of order sought by the parties

The Commission, the *applicant*, claims that the Court should:

(i) declare that, by not adopting the provisions necessary to allow non-taxable persons who import goods on which VAT has already been levied in another Member State, without the

possibility of obtaining a refund of that tax, to deduct from the VAT due on importation the residual portion of the VAT paid in the Member State of exportation which is still included in the value of the goods at the time of exportation, the Hellenic Republic has failed to fulfil its obligations under Article 95 of the Treaty establishing the European Economic Community;

(ii) order the Hellenic Republic to pay the costs.

The Hellenic Republic, the *defendant*, contends that the Court should:

(i) dismiss the application of the Commission of the European Communities;

(ii) order the Commission of the European Communities to pay the costs.

The Kingdom of Spain, the *intervener*, claims that the Court should:

(i) declare that the Hellenic Republic has not failed to fulfil its obligations under Article 95 of the Treaty establishing the European Economic Community;

(ii) order the Commission to pay the costs, including those of the intervener.

III — Submissions and arguments of the parties

According to the *Commission*, the abovementioned judgments of the Court in the *first* and *second Gaston Schul* cases, in the *Bergeres-Becque* case and in the *Drexl* case, along with the judgment of the Court in *Abbink* (Case 134/83 [1984] ECR 4097), make it clear that where a private individual imports into a Member State second-hand goods, whether or not acquired for valuable consideration, or personal effects, or even a means of transport, which at the time of their importation still bear in full or in part the VAT charged in the Member State of exportation, and that private individual is unable to obtain a refund of that VAT in the Member State of exportation or a tax exemption on importation, the Member State of importation must take account of that residual VAT in such a way that that amount is not included in the taxable amount and is deducted from the VAT due on importation. The Commission also stresses that the judgments of the Court cited above merely illustrate a general principle which prohibits double taxation subject to the terms and conditions laid down by the Court.

The Commission goes on to point out that the observations submitted by the Greek Government in its letter of 27 October 1987 show that it does not accept the Court's interpretation relating to the obligation on the Member State to deduct VAT contained in the value of goods at the time of their importation and that it had received written complaints from Greek nationals about double imposition of VAT. The Commission notes that the Greek legislation contains no specific provision which deals with the case of an ultimate user who imports goods on which VAT has already been levied in another Member State and

part of which is still contained in the value of the goods when they are imported. It points out that the absence of such a provision creates a situation which is unclear for Community nationals, something which runs counter to the principle of legal certainty (see the judgment in Case 169/80 *Administration des douanes* v *Gondrand Frères* [1981] ECR 1931, and in Case 168/85 *Commission* v *Italy* [1986] ECR 2945). Moreover, it stresses that the Greek legislation, in its present form, allows double taxation contrary to Article 95 of the Treaty.

The Commission also states that the obligation on the Hellenic Republic to adopt measures which will enable its nationals to know their rights clearly and precisely arises under Article 5 of the Treaty.

In addition, it stresses that the fact that Article 95 of the Treaty is directly applicable does not release the Hellenic Republic from its obligation to adapt its domestic legislation to the requirements of the EEC Treaty (see the judgment of the Court in Case 168/85 *Commission* v *Italy*, cited above).

Furthermore, the Commission points out that the fact that an amended proposal for a Sixteenth VAT Directive has been submitted to the Council cannot mean that Article 95 of the Treaty is no longer applicable. It emphasizes in that regard that the implementation of the programme for the harmonization of tax laws under Article 99 does not represent a precondition for the application of that provision (see the judgment in Case 171/78 *Commission* v *Denmark*, and in the *Gaston Schul I* case, cited above). It adds that it would be contrary to the division of powers between the Community and the Member States for the latter not to apply Community law as interpreted by the Court on the ground that such application would lead to a result which the Community legislature would have sought to avoid by a different legislative provision (see the judgment in Case 299/84 *Neumann* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1985] ECR 3663).

The *Hellenic Republic* claims that the judgments of the Court in the *first* and *second Gaston Schul* cases failed to answer clearly a number of questions which arise in connection with the application of the principles which they lay down. Those questions concern in particular the rules for calculating the VAT paid in the Member State of exportation and determining the length of time for which the goods must be used in the Member State of exportation in order that they may be treated as second-hand goods at the time of exportation. It also points out that the Commission submitted in succession two proposals for a Sixteenth VAT Directive which, with the aim of preventing double taxation where individuals import goods on which VAT has definitively been paid, envisaged a system different from that resulting from the Court's judgments in the *first* and *second Gaston Schul* cases.

In the view of the Hellenic Republic, the submission and subsequent withdrawal of the original and amended proposals for a Sixteenth VAT Directive, together with the discrepancies between the rules which those proposals contain and the rules derived from the relevant judgments of the Court, demonstrate that it is not possible to apply the principles formulated in those judgments without greater clarification of the questions to which they give rise.

While it is not opposed to the principle of the elimination of double taxation, the Hellenic Republic believes that this is a matter which requires clear and precise rules in the form of a Community directive; this, it is claimed, is the only solution which will enable the relevant principles to be applied uniformly.

The *Kingdom of Spain* points out first of all that a number of methods have been proposed with a view to avoiding double imposition of VAT in cases where a private individual in one Member State imports goods from another Member State. However, it believes that the method advocated by the Commission in the present case is at odds with the nature of VAT. It stresses that VAT is a tax on consumption. In keeping with the nature of VAT, goods ought to benefit from a remission of tax on exportation and be taxed on importation according to their value when they cross the border.

The Kingdom of Spain submits that the crucial problem in the case is not one of taxation that discriminates against imported goods but of the collection of VAT and the apportionment of tax revenue between the Member State of exportation and that of importation. Article 95 of the EEC Treaty does not therefore concern the problem at the heart of the case and the Hellenic Republic cannot be accused of any failure to fulfil its obligations under that provision.

In the absence of a system under which the Member State of importation may recover from the Member State of exportation the amount of VAT imposed by the latter and deducted at the time of importation, the procedure advocated by the Commission is at variance with the principles underlying the Treaty and with the rules for the harmonization of tax laws adopted pursuant to Article 99 which seek to ensure an equitable distribution of revenue between Member States. That procedure would, in effect, result in the unjust enrichment of the Member State of exportation and would deprive the Member State of importation of the tax revenue to which it was entitled. That system is all the more inequitable because it mainly affects the Member States with the weakest economies and the lowest living standards because they become the recipients of an ever-increasing influx of second-hand goods.

Moreover, it is clear from the judgment of the Court in the *Gaston Schul I* case that, in the Court's own view, the ideal system would be to deduct residual VAT from the goods in the Member State of exportation and that the procedure advocated by the Commission was only envisaged as a temporary arrangement until such time as that ideal system could be implemented. The Kingdom of Spain therefore believes that, in view of the progressive removal of fiscal frontiers and the concomitant problems of double taxation, the Court may at present be prevailed on to reconsider or change the emphasis in the solution which it adopted in that judgment.

IV — Replies to the questions posed by the Court

A — The Court requested the Hellenic Republic to provide it with details of the Greek legislation governing the importation by non-taxable persons of goods on which VAT has been definitively imposed in the Member State of exportation.

The *Hellenic Republic* states that the relevant legislation is Law No 1642/86 (*Official Journal of the Hellenic Republic* No 125, 21.9.1986), Article 2(b) of which provides that imports shall be subject to VAT.

It also points out that the problems associated with a possible double imposition of VAT are examined on a case-by-case basis by the relevant departments of the Ministry of Finance. These take account of the country of origin and the age of the item in question in order to determine its taxable value at the time of importation and to make allowance for the VAT which may be contained in the value of the item when it is exported.

B — The Court requested the Commission to state the reasons in law why Member States whose domestic legislation gives effect to Article 2 of the Sixth VAT Directive should be required to adopt express legal provisions in order to ensure compliance with Article 95 of the Treaty, in view of the fact that the judgment in the *Gaston Schul I* case affirmed the validity of Article 2 of the Sixth VAT Directive by interpreting it in accordance with Article 95 of the Treaty.

The *Commission* does not believe that the application of the principles laid down in the *Schul* cases makes it necessary in law for Member States to amend their domestic legislation, provided that an administrative provision gives the necessary instructions to administrative staff and that such a provision is adequately publicized. The Commission adds that each Member State is free to choose the form of the measure to be adopted, provided that the legal principles enunciated in the *Schul* cases are applied effectively.

The Commission relies on the following grounds in support of its position.

In the first place, Article 2 of the Sixth VAT Directive does not set out expressly the principles laid down by the Court in the *Schul* cases. Consequently, Member States whose domestic legislation gives effect to Article 2 of the Sixth VAT Directive must adopt additional measures to ensure that those legal principles and Article 95 of the EEC Treaty are complied with.

Secondly, the Court has set out all the detailed rules for the application of the principle laid down in its judgment in the *Gaston Schul I* case. It is necessary to ensure that those rules are respected and uniformly applied by all authorities responsible for the collection of VAT in each Member State.

Thirdly, since officials responsible for VAT collection are part of the national administrative system, they will not apply the legal principles laid down in the *Schul* cases unless they have been instructed to do so by their respective authorities.

Fourthly, the adoption of national measures is vital for the purposes of clarity and legal certainty, both for the officials whose function it is to collect VAT and for nationals of the Member State in question, since the latter are not necessarily familiar with the principles laid down in the *Schul* cases (see the judgment of the Court in Case 257/86 *Commission* v *Italy* [1988] ECR 3249 and in Case 143/83 *Commission* v *Denmark* [1985] ECR 427). According to the decided case-law of the Court, the fact that Article 95 is directly applicable

represents no more than a minimum guarantee which is insufficient to ensure that the Treaty is applied in full (see the judgment in Case 72/85 *Commission* v *Netherlands* [1986] ECR 1219 and in Case 168/85 *Commission* v *Italy* [1986] ECR 2945).

Fifthly, if there are no national provisions laying down in detail the conditions and rules determining how the *Schul* principles are to be applied, the Commission has no way whatever of checking that Member States are complying with Article 95 of the EEC Treaty. In those circumstances, national courts and tribunals alone are in a position to ensure that Member States respect Community law.

The Commission also points out that all the Member States, with the exceptions of the Italian Republic, the Kingdom of Spain and the Hellenic Republic, have already introduced national provisions designed to apply the *Schul* principles and that the Hellenic Republic is not applying those principles, as is shown by the complaints received in that regard by the European Parliament and the Commission.

T. F. O'Higgins
Judge-Rapporteur